


भारत का राजपत्र
The Gazette of India

असाधारण
EXTRAORDINARY

भाग II—खण्ड 2
PART II—Section

प्रधिकार से प्रकाशित
PUBLISHED BY AUTHORITY

सं० 36ए] नई दिल्ली, सोमवार, जुलाई 22, 1968/आषाढ़ 31, 1890
No. 36A] NEW DELHI, MONDAY, JULY 22, 1968/ASADHA 31, 1890

इस भाग में भिन्न पृष्ठ संख्या दी जाती है जिससे कि यह प्रलग संकलन के रूप में रखा जा सके ।

Separate paging is given to this Part in order that it may be filed as
a separate compilation.

LOK SABHA

The following report of the Joint Committee on the Bill further to amend the Constitution of India was presented to Lok Sabha on the 22nd July, 1968:—

COMPOSITION OF THE COMMITTEE

Shri R. K. Khadilkar—*Chairman*.

MEMBERS

Lok Sabha

2. Shri R. S. Arumugam
3. Shri N. C. Chatterjee
4. Shri Surendranath Dwivedy
5. Shri Ram Krishan Gupta
6. Shri S. M. Joshi
7. Shri Kameshwar Singh

8. Shri Krishnan Manoharan
9. Shri D. K. Kunte
10. Shri J. Rameshwar Rao
11. Shri V. Viswanatha Menon
12. Shri Mohammad Yusuf
13. Shri Jugal Mondal
14. Shri H. N. Mukerjee
15. Shri Nath Pai
16. Shri P. Parthasarthy
17. Shri Deorao S. Patil
18. Shri Khagapathi Pradhani
- *19. Chaudhari Randhir Singh
20. Shri K. Narayana Rao
21. Shri Mohammad Yunus Saleem
22. Shri Anand Narain Mulla
23. Shri Dwaipayan Sen
24. Shri Prakash Vir Shastri
25. Shri Digvijaya Narain Singh
26. Shri Sant Bux Singh
27. Shri Sunder Lal
28. Shri V. Y. Tamaskar
29. Shri Tenneti Viswanatham
30. Shri P. Govinda Menon

Rajya Sabha

31. Shri Chitta Basu
32. Shri M. V. Bhadram
33. Shri Kota Punnaiah
34. Shri M. P. Bhargava
35. Shri K. Chandrasekharan
36. Shri A. P. Chatterjee
37. Shri Jairamdas Daulatram
- **38. Shri Ram Niwas Mirdha

*Appointed on the 22nd December, 1967 *vice* Shri K. Hanumanthaiya resigned.

**Ceased to be a member of the Joint Committee w.e.f. 2nd April, 1968 on his retirement from Rajya Sabha and was re-appointed by Rajya Sabha on the 10th May, 1968.

39. Shri G. H. Valimohmed Momin
40. Shri G. R. Patil
41. Shrimati Yashoda Reddy
42. Shri Jogendra Singh
43. Shri Rajendra Pratap Sinha
- †44. Shri N. R. Muniswamy
- †45. Shri Banka Behary Das.

REPRESENTATIVES OF THE MINISTRY OF LAW

1. Shri V. N. Bhatia, *Secretary, Legislative Department.*
2. Shri K. K. Sundaram, *Jt. Secretary and Legislative Counsel.*

SECRETARIAT

Shri M. C. Chawla—*Deputy Secretary.*

†Appointed on the 10th May, 1968 *vice* Sarvashri J. Sivashanmugam Pillai and Trilok Singh who ceased to be members of the Joint Committee w.e.f. 2nd April, 1968 on their retirement from Rajya Sabha.

REPORT OF THE JOINT COMMITTEE

1, the Chairman of the Joint Committee to which the Bill† further to amend the Constitution of India was referred, having been authorised to submit the report on their behalf, present their Report, with the Bill as amended by the Committee, annexed thereto.

2. The Bill was introduced by Shri Nath Pai in Lok Sabha on the 7th April, 1967. The motion for reference of the Bill to a Joint Committee was moved in Lok Sabha by Shri P. Govinda Menon, Minister of Law on the 23rd June, 1967. The motion was discussed on the 23rd June, 7th and 21st July and 4th August, 1967 and adopted on the 4th August 1967.

3. Rajya Sabha discussed and concurred in the said motion on the 18th August, 1967.

4. The message from Rajya Sabha was published in the Lok Sabha Bulletin, Part II, dated the 21st August, 1967.

5. The Committee held fifteen sittings in all.

6. The first sitting of the Committee was held on the 7th September, 1967 to draw up their programme of work. The Committee felt that in view of the importance of the Bill, they should hear every possible point of view on the subject. The Committee at this sitting, therefore, decided that a Press Communique should be issued advising public bodies, Chambers of Commerce, Organisations, Associations and individuals who were desirous of submitting their suggestions or views or of giving evidence before the Committee in respect of the Bill, to send written memoranda thereon for the purpose. The Committee also decided to invite the views of all the State Governments, Supreme Court, all High Courts, all Bar Councils, representative all-India Trade Union Organisations, the Indian Law Institute, the Institute of Constitutional and Parliamentary Studies, Indian Society of International Law, Incorporated Law Society and International Commission of Jurists, on the provisions of the Bill and to inform them that they could also give oral evidence before the Committee, if they so desired.

7. 35 memoranda/representations were received from different States/High Courts/Bar Councils/associations/individuals.

†Published in Gazette of India, Extraordinary, Part II, Section 2, dated the 7th April, 1967.

8. At their second to eighth sittings held on the 23rd to 27th October, 18th and 25th November, 1967, respectively, the Committee heard the evidence given by ten eminent legal and constitutional jurists and representatives of associations.

9. The Report of the Committee was to be presented by the first day of the Third Session. As this could not be done, the Committee at their second sitting, held on the 23rd October, 1967 decided to ask for extension of time for presentation of their Report upto the last day of the Third Session. Necessary motion was brought before the House and adopted on the 14th November, 1967. At their eighth and tenth sittings held on the 25th November, 1967 and 29th January, 1968, the Committee decided to ask for further extensions of time upto the first day of Fourth Session and again upto the first day of the Fifth Session which were granted by the House on the 30th November, 1967 and on the 13th February, 1968, respectively.

10. The Committee have decided that the Evidence and the Statement containing a gist of main points made by the witnesses in their evidence given before the Committee should be printed and laid on the Tables of both the Houses.

11. The Committee considered the Bill clause-by-clause and implications of the various proposed amendments at their ninth and tenth sittings held on the 27th and 29th January, 1968.

12. At their eleventh sitting held on the 11th May, 1968, the Committee decided to take up further consideration of the Bill at their sittings to be held at Bangalore, subject to the approval of the Speaker. The Speaker before whom the matter was placed kindly consented to the sittings being held in Bangalore.

The Committee accordingly met in Vidhan Soudha, Bangalore from the 10th to 12th July, 1968 to resume clause-by-clause consideration of the Bill. At their sitting held on the 11th July, 1968, the Committee appointed an 11-member sub-Committee to draw up an agreed draft of the amendments to be made in the Bill in the light of oral evidence, written memoranda and discussions. At their sitting held on the 12th July, 1968, the Committee approved the draft submitted by the sub-Committee, and adopted the Bill as amended subject to minute of dissent, if any, that might be given by the members.

13. The following changes are proposed in the Bill:

Clause 1 and Enacting Formula: The amendments made therein are of a consequential nature.

Clause 2: (i) With a view to making the intention clear that article 368 deals with the substantive power of amendment rather than with the procedure of amendment, the marginal heading to article 368 has been suitably amended. The change made in sub-clause (1) of clause 2 of the Bill is only of a drafting nature.

(ii) The Committee feel that, in view of the importance of Fundamental Rights, State Legislatures should also be associated with the amendment of the provisions contained in Part III. They have accordingly brought Part III, within the purview of the proviso to article 368. Henceforth, all constitutional amendments relating to Part III would also have to be ratified by the Legislatures of not less than one-half of the States.

(iii) The Committee have added a new sub-clause (3) providing that nothing contained in article 13 shall apply to any law made by Parliament in pursuance of article 368.

14. The Committee considered and adopted the Report on the 13th July, 1968.

15. The Joint Committee recommend that the Bill as amended be passed.

BANGALORE;
The 13th July, 1968.
Asadha 22, 1890 (Saka).

R. K. KHADILKAR,
Chairman,
Joint Committee.

MINUTES OF DISSENT

I

After having had the benefit of the evidence and discussions, I am of opinion that the Bill as introduced in Lok Sabha on 7th April, 1967 by Shri Nath Pai, M.P. does not require any change of a substantial or material nature.

2. The Committee has suggested 4 amendments, and they relate to:—

- (1) the enacting formula,
- (2) the Marginal Note,
- (3) a reference to Article 13 so as to take away law enacted in pursuance of Article 368 from out of the ambit of law under Article 13, and
- (4) a reference to Part III of the Constitution possibly so as to bring any amendment abridging or curtailing fundamental rights within the scope of the proviso which require a law of that nature passed by Parliament to be ratified by the legislatures of not less than half of the States.

3. So far as the amendments proposed to the enacting formula are concerned, they are only consequential to the passage of time since the introduction of the Bill, '18th year' of the Republic becoming '19th Year', and '1967' being changed into '1968'.

4. The marginal note is being changed from 'procedure for amendment of the Constitution' to 'power to amend the Constitution'. That is consequential to clause 2 of the Amendment Bill. Although for the purposes of the power, the content of the Article and not the marginal note is the relevant factor and therefore an amendment of the marginal note may not be absolutely necessary, even then the amendment seems proper and justified.

5. So far as the reference to Article 13 is concerned it really does not help, although here again there may not be any harm on account of the provision now proposed in the report.

6. The majority judgment in Golak Nath's case has held on three points so far as the future is concerned:

- (1) The power of Parliament to amend the Constitution is derived from power to legislate contained in Articles 245, 246 and 248, Article 368 being procedural;
- (2) Amendment is law within the meaning of Article 13, and therefore any amendment taking away or abridging fundamental rights is void; and
- (3) Parliament will have no power from the date of the decision to amend any of the provisions of Part III so as to take away or abridge fundamental rights.

The Bill we considered amply meets point No. 1. But so far as point Nos. 2 and 3 above are concerned, the Supreme Court alone by another judgment can possibly change the position. So even though we may now say that amendment in pursuance of the amended Article 368 is an amendment by Parliament not in pursuance of its legislative powers but in pursuance of its constituent power specifically conferred by Article 368, the Supreme Court may still hold that this Constitutional amendment itself is hit by Article 13 which does not exclude any type of law. Any way the constituent power that is exercised by Parliament in pursuance of the amended provision would undoubtedly give a new force to this argument that a Constitutional amendment in pursuance of constituent power cannot come within Article 13(2) and law as referred to by it. Therefore although this amendment had been by and large proposed in the form of a non obstantive clause, the provision as contained in the Bill as reported by the Joint Committee is also acceptable to me.

7. However my objection to the 4th amendment proposed referred to in clause (ii) of Clause (2) (c) in the Bill as reported by the Joint Committee is of a fundamental nature. Under the proviso to Article 368 as it stands now, the following are the provisions which if amended are subjected to ratification by at least half of the State legislatures, namely election of President, manner of election of President, extent of executive power of Union, extent of executive power of State, High Courts for Union territories, the Union Judiciary, the High Courts in the States, Legislative relations between the Union and the States, subject of laws made by Parliament and by the Legislatures of States as contained in Union list, State list and concurrent list, the representation of States in Parliament and the provisions of Article 368 itself. The framers of the Constitution has therefore followed a clear scheme in the matter of ratification by the

States. It is only when Parliament amends any provision of the Constitution touching a matter which concerns the States or both the States and the Centre, that ratification is necessary. In the matter of amendments of Constitutional provisions pertaining to Parliament, or matters relating to finance, property, contracts and suits, or elections, or special provisions relating to certain classes including the Scheduled Castes and Scheduled Tribes and Anglo Indians contained in Part XVI, or the official language, or the emergency provisions, Parliament's power to amend is not subjected to ratification by the States. In the proviso to Article 368 as it has stood all these years, there has been no reference to Part III, and no Constitutional amendment previously which took away or abridged fundamental rights was ever thought of as one to be subjected to ratification by the States. By now suggesting that any amendment seeking to make any change in Part III of the Constitution should also be included in the proviso to Article 368 is to make a fundamental deviation from the very scheme of things adopted in the proviso to Article 368.

8. It would also appear that the proposal to bring any amendment relating to Part III within the scheme of the proviso would be really outside the province of this Amendment Bill. It will be seen from the objects and reasons appended to the Bill as introduced in the Lok Sabha and from the evidence that was led before the joint Committee that the simple purpose of this Bill is to restore the position anterior to the decision of the Supreme Court in *Golak Nath's case*. This Bill does not evidence an attempt to examine the propriety of the various Constitutional provisions including those in Article 368 and the question is whether original contributions should be made at this stage by amendments of a far reaching nature and departing from the very scheme of things adopted in the Constitution. The provisions as they stand now in Article 368 and as they were construed in *Shankari Prasad's case* and *Sajjan Singh's case* by the Supreme Court and which was considered by all including Parliament as the position prior to *Golak Nath's case* are neither too rigid, nor too flexible or easy, in the matter of actual amendment of a Constitutional provision. If the membership of the Lok Sabha is 520, a minimum of 261 should be present and voting for the purposes of carrying a Constitutional amendment. This is so if 261 members alone are present. Suppose there are 500 members present in the Lok Sabha at the time of voting on a Constitutional amendment, in that case a minimum of 333 members should vote in favour of the Constitutional amendment, if the amendment is to be carried. One may ask whether there are not anomalies in this procedure. The answer is that there are anomalies in everything and even in the so-called perfect things. Let us take for example the anomaly in the results

of general elections. In a particular constituency one candidate gets 14,000 votes, the other gets 10,000 votes and a third gets 8,000 votes. The candidate who gets 14,000 votes is declared elected, even though in a total electorate of 32,000, a majority, that is 18,000, have not preferred this winning candidate. This anomaly can be reduced if the election is indirect and by the system of single transferable vote. But in practice it is just not possible to adopt this system for a large electorate. So even with the anomaly that when more members are present in Parliament, more have to vote if the amendment is to be carried, one can clearly see that the result of the anomaly is certainly to secure that constitutional amendment is carried only with a large consensus amongst Parliament members present. The further question is whether the minimum of security necessary for guarding against hasty or over-easy amendments is maintained. That is certainly maintained in that in a House of 520, at least 261 members must be present and voting in favour of the amendment if the amendment is to be declared carried.

9. No doubt, and in a way, fundamental rights are permanent and sacrosanct. But we have got to view even fundamental rights against the background of the requirements of a changing society in a swiftly moving world. In a dynamic society with changing pattern of socio-economic relationship, rights and obligations under review, amendments become necessary from time to time. The majority judgment of the Supreme Court in fact refers to this aspect, and in passing has even referred to the possibility of convening a constituent Assembly for amending fundamental rights. The debates in the Constituent Assembly on the draft Articles 24, 304 and 305 clearly indicate that the entire Constitution including Part III was amendable by Parliament by following the procedure laid down in the Constitution, and there is no ratification by States in case of amendment to Part III provisions. The framers of the Constitution never meant to make any difference in the matter of procedure so far as amendments relating to Part III provisions or any other provision of the Constitution which could be passed by Parliament alone. The very fact that the Constituent Assembly did not deem it fit to include Part III in the proviso to Article 368 indicates that the framers of the Constitution did not intend to make any difference between amendment to provisions in Part III or to other amendments. It was never thought at the time of making the Constitution that a different procedure has got to be adopted while amending the provisions in Part III or while taking away or abridging the rights contained in Part III. Even a distinguished member of the Constituent Assembly who gave evidence before the Joint Committee stated that it was but true that when the Constituent Assembly came to the consideration of

Article 368 it did not think of excluding Part III from the purview of Article 368. This means that amendment to Part III rights by taking away or abridging was not at all treated as anything special.

10. Hon'ble Dr. B. R. Ambedkar on the 25th November, 1948 stated in the Constituent Assembly as follows:—

“The Assembly has not only refrained from putting a seal of finality and infallibility upon this Constitution by denying to the people the right to amend the Constitution as in Canada or by making the amendment of the Constitution subject to the fulfilment of extraordinary terms and conditions as in America or in Australia, but has provided a most facile procedure for amending the Constitution. I challenge any of the critics of the Constitution to prove that any Constituent Assembly anywhere in the world has, in the circumstances in which this country finds itself, provided such a facile procedure for the amendment of the Constitution.”

11. The Prime Minister Hon'ble Shri Jawaharlal Nehru said on 11th November, 1948 in the Constituent Assembly as follows:—

“While we want this Constitution to be as solid and permanent as we can make it, there is no permanence in Constitutions. There should be a flexibility. If you make anything rigid and permanent, you stop the nation's growth, the growth of a living vital organic people. In any event, we could not make this Constitution so rigid that it cannot be adapted to changing conditions. When the world is in turmoil and we are passing through a very swift period of transition, what may be good to-day may not be wholly applicable to-morrow.”

12. I may also refer to the following passage from Thomas Paine's “Rights of Man”:

“There never did, there never will, and there never can, exist a Parliament, or any description of man, or any generation of men, in any country, possessed of the right or the power of binding and controlling posterity to the ‘end of time’, or of commanding for ever how the world shall be governed, or who shall govern it; and therefore all such clauses, acts or declarations by which the mak-

ers of them attempt to do what they have neither the right nor the power to do, nor take power to execute, are in themselves null and void. Every age and generation must be as free to act for itself in all cases as the ages and generation which preceded it.

* * * *

Every generation is, and must be, competent to all the purposes which its occasions require. It is the living, and not the dead, that are to be accommodated. When man ceased to be, his power and his wants cease with him; and having no longer any participation in the concerns of this world, he has no longer any authority in directing who shall be its governors, or how its government shall be organized, or how administered."

13. I may also refer to the following passage from the minority judgment of Justices K. N. Wanchoo and V. Bhargava and G. K. Mitter in Golak Nath's case:—

"The power of amendment contained in a written federal Constitution is a safety valve which to a large extent provides for stable growth and makes violent revolution more or less unnecessary. It has been said by text book writers that the power of amendment, though it allows for change, also makes a Constitution long-lived and stable and serves the needs of the people from time to time. If this power to amend is made too rigid it loses its value as a safety valve. The more rigid a Constitution the more likely it is that people will outgrow it and throw it over-board violently."

14. It is inconceivable that any part of the Constitution should be considered immutable for all time to come, whatever the circumstances. In the life of a Nation, situations may arise when the interests of individuals might have to be subordinate to the interests of the Society or the Nation as a whole, and to this end, fundamental rights of individuals might have to be curtailed.

15. The Joint Committee has certainly decided that the provisions of Part III are amendable and Parliament can take away or abridge the fundamental rights in Part III. On coming to that conclusion, the Joint Committee has rightly rejected the plea that an amend-

ment taking away or curtailing fundamental rights in Part III should be subjected to ratification by a referendum, or that such an amendment should only be passed in a freshly created Constituent Assembly, or that the passing of such an amendment should be supported by a higher majority than that is provided now in Article 368. The facile procedure for amendment that Dr. B. R. Ambedkar spoke of, the warning that Pandit Nehru gave when he said that even so far as fundamental rights what is good for to-day is not good for to-morrow and what we require is flexibility and not rigidity, the statement of Thomas Paine that every age and generation must be free to act, the statement of the Hon'ble three Judges of the Supreme Court led by the erstwhile Chief Justice of India, at that time Mr. Wanchoo(J), that we have to guard against violent revolutions by providing easy methods of amendment, are forgotten. Particularly in the context of the swiftly changing social, economic and political conditions in this country, and the pace of change is likely to be only accelerated in future, and particularly from the stand point of maintaining and consolidating and strengthening the integrity of this Nation as a whole in all spheres, the country requires a fairly easy method of amending the provisions in Part III of the Constitution also, whether the amendment relates to taking away or abridging rights contained therein. The method of circulation to States would cause unduly harsh restrictions in the amending procedure and would also undoubtedly delay the passing and implementation of the amendments. The Bill that was introduced was just for the purpose of restoring the country to the position that existed prior to Golak Nath's decision. The Joint Committee deliberated for quite a length of time and has now decided that the pre-Golak Nath position has to be restored. A revolutionary change is being proposed for the proviso to Article 368, but actually the clock of revolution is being put back. The Joint Committee wanted to avoid the effect of the decision in Golak Nath's case, but the effect of Golak Nath's decision has registered itself in another form in the report of the Joint Committee. I regret my inability to support the proposal that an amendment relating to a provision in Part III of the Constitution should be brought within the purview of the proviso to Article 368 so as to require ratification by at least half the number of State Legislatures.

ERNAKULAM:

K. CHANDRASEKHARAN

July 15, 1968.

II

It is with poignant regret I respectfully disagree with the majority view of the Members of the Joint/Select Committee.

2. I am totally opposed to the new clause (3) added in the amending Bill. It acts as an escape from restrictions against undue State's actions enacted in the Constitution itself. It postulates a feeling that this power is intended to be used occasionally on an experimental basis. The power of amendment should not be used for purposes of removing express or implied restrictions against the States. This visualizes an avoidance of a remote possibility of prospective or anticipatory overruling of the Supreme Courts of any law made in pursuance of this amendment of the Constitution. This is something unusual in the normal functioning of a supreme legislative body of any democratic country. It gives an impression to the society that the State is more capricious than an individual. Such attempts in violation of self-imposed restrictions are unconstitutional and totally reactionary.

3. This amendment of the Article is primarily meant to exclude the word 'law' from the definition of the word 'law' in Article 13, clause (3) sub-clause (a) of the Constitution. The new sub-clause (3) of the amending Bill places all Constitutional amendments beyond the purview, scope and implication of Article 13 of the Constitution. This is something unheard of in the annals of the legislative field.

4. An amendment of the Constitution is itself a law and therefore to eliminate Article 13 of the amending Bill is beyond the competency of the Parliament and it will indirectly hit at Articles 32 and 226 of the Constitution from achieving an effective constitutional remedy. The Articles 32 and 226 of the Constitution are there to review the legislative enactment, regulations, rules and other orders with a view to protect the rights of the citizens. They are there with unfettered powers for effective judicial remedy. We must make distinction between rights and laws. Rights are unalterable and laws could be altered. The fundamental rights are inviolable and unalterable.

5. The matter is of grave public importance and an authoritative pronouncement by the Supreme Court was already made in I. C.

Golak Nath's case whereby the Parliament which is the creature of the Constitution has no constituent power to alter any of the provisions of Part III of the Constitution. Nowhere has it been said in the Constitution that this Parliament can *ipso facto* convert itself into a constituent body. Therefore this Parliament cannot get round and nullify the effect of some provisions in Part III by adding a new clause as clause (3) to the amending Bill which cuts the very root of the jurisdiction of the Supreme Court and the High Court guaranteed under Articles 32 and 226 of the Constitution.

6. Now the point is that the Supreme Court says that this Parliament has no power to amend Part III but this amending Bill says that it has. Who is to decide this difference? The verdict is against the Parliaments' power. It must be done either by the constituent body or by adopting appropriate steps by the President of India to refer this issue back to the Supreme Court to review its decisions. This tussle cannot be solved by taking a view that the Parliament has the power to amend the Constitution. I am afraid whether this will end at this. This is bound to crop up again in the courts which might take a serious view of this issue since it was being manoeuvred by amending the Article 368 in this inexpedient manner.

7. The other amendments such as modifying the marginal heading and bringing Part III of the Constitution within the purview of the proviso to Article 368 are equally of much importance but my comments *supra* will cover these aspects also.

NEW DELHI;

N. R. MUNISWAMY.

July 19, 1968.

III

1. I do not agree with the recommendation of the Committee that the Constitution should be amended as reported by the Select Committee.

2. I hold the view that when the Constitution of India was framed and passed by the Constituent Assembly, it was definitely intended that Parliament should have no power to take away or abridge any of the Rights conferred on India's Citizens by Part III of the Constitution.

3. The conception of unabridgable fundamental rights was the keystone of the national structure planned as a result of the first effort, at the national level to bring together all sections of the people of the Country and join in managing the affairs of a Free India. This was absolutely clear during the protracted discussions of the leaders of all these sections which culminated in the adoption in 1928 of the famous Nehru Report by the All Party Committee presided over by the late Motilal Nehru. This pre-independence framework of the Constitution for a Free India was founded on the basic decision that unabridgable Fundamental Rights agreed upon by all the parties were a vital part of any Constitution for our country if our multi-religious, multi-racial, multi-lingual, multi-cultural and economically differentiated, peoples are to hold together as a nation. The Nehru Report was the outcome of reconciliation of conflicting interests within the nation and the scheme of fundamental rights was the basis of a grand partnership in the Joint Governance of the country.

4. This concept of unabridgable Fundamental Rights which was given a concrete form in the Nehru Report nearly twenty years before the Constitution of India was framed by us in 1946—50, was ever present in the minds of those who in the Constituent Assembly's Committee on Fundamental Rights went deep into the question and thrashed out all the issues involved. Stray references here and there in the on-the-spot-replies, by some of the Speakers, however eminent, to points of criticism made during the debates in the Constituent Assembly in regard to Fundamental Rights, did not affect the opinion in the Assembly, that while Part III was not "unamendable" by Parliament in the context of changing times, the Fundamental

Rights incorporated in it are not amendable in the direction of abridgement or abrogation.

5. The Constituent Assembly was created as a result of the acceptance by the country of the Cabinet Mission Plan of 1946. That Plan laid down the steps which were to be taken by the Constituent Assembly. The Constituent Assembly adopted those steps. The following step was one of those laid down:

"The Advisory Committee on Rights of Citizens, minorities and tribal and excluded areas should contain full representation of the interests affected, and their function will be to report to the Union Constituent Assembly upon the list of Fundamental Rights, the clauses for the protection of minorities and a scheme for the administration of the tribal and excluded areas and to advise whether these rights should be incorporated in the Provincial Group or Union Constitution."

6. The Concept of this step clearly was not that the Fundamental Rights were some temporary Rights, their life depending on the will, for the moment, of a certain majority in Parliament, but that they were permanent Rights if the object of those Rights, namely to ensure the protection of Citizens against unjust action by the State, the protection of minorities against unjust action by majorities, the protection of tribal and excluded areas and their inhabitants against unjust action by the people of the more advanced areas in the country was at all to be fulfilled. The Fundamental Rights as contemplated by those who framed the Cabinet Mission Plan, i.e. by those who represented the British Government, while handing over all power to the people of India and therefore entrusting the Constituent Assembly, with the responsibility of framing the Constitution of Free India, were to be rights which are basic and permanent and were not amendable prejudicially to the interests of the categories of the people mentioned in the British Government's historic document for the transfer of power to the representatives of India. Viewed in this right there is an obligation on us to treat the Fundamental Rights framed under these circumstances as not abrogatable or abridgeable.

7. My stand that Part III of our Constitution is not amendable in the direction of abridgement or abrogation of the Rights listed in it except as provided under Articles 33 and 34 is however not based not only on what was really our intention at the time of the Constituent Assembly. I hold that in the special circumstances of our country it is essential that the Fundamental Rights under Part III should

be considered sacrosanct and Parliament ought not to have the power to abridge or abrogate any of them except as already provided by Articles 33 and 34. The special circumstances are the same to which I have made reference in para 3 above.

8. None of the Fundamental Rights in Part III of the Constitution is so *fundamental* as that contained in article 32, which confers on a citizen of India the fundamental right to move the highest judiciary in the land for the enforcement of the Rights given by Part III. Dr. Ambedkar who piloted the Constitution through the Constituent Assembly referring to this Article, described it as "the soul" of the Constitution. This Article, is fundamental to the Fundamental Rights under Part III. He could never have meant to convey by any words anywhere in his speeches that any Parliament of the day by any majority vote remove the very "soul" of the Constitution. As obviously, as patently, as indisputably as anything could be, article 32, could not have been intended to be **abrogatable**. The present bill provides Parliament with power to kill the "soul" of the Constitution.

9. The Fundamental rights under Part III are "the rights of Man in India" and when we give ourselves power to take away or abridge "Right of Man in India" or remove from them the protection of the judiciary, we shall be moving in the direction of an authoritarian system of Government. If a single dominant Parliamentary party, which is also in power in less than a majority of the State Legislatures, allows itself to be governed by the expediency of the moment shaped by a highly emotional people and cuts down any of the Rights of Man, it will be in *effect* a repudiation of the democratic character of the Constitution. The Rights of Demos, the right of a single citizen, to any of "the rights of man" will be at the will of the political party if in adequate majority in Parliament even though not in the States. The form of action may outwardly appear democratic and so knowing that the majority vote in a Legislative organ is manipulatable, the prudent framers of the Constitution, in dealing with our emotional people, took well considered steps to protect the minorities against such a majority and placed in the highest judiciary between the majority and the minority and gave to the latter the shelter of unbridgeable Fundamental Rights. A Democracy under which the majority fails to function as Trustee for the minorities is not democracy in the true sense of the word. And the recent movement against the existence of a monolithic Party whatever its colour, has no meaning if a monolithic party is to be vested with the power to abrogate or abridge Fundamental Rights which

abrogation or abridgement indirectly affects a political minority's growth into a majority, or a permanent religious, linguistic, or allied minority's right to live its life in these spheres as it likes.

10. I hold that Article 33 is conclusive internal proof that Part III was not amendable by Parliament in the direction of *abrogation* or *abridgement* of the fundamental rights except under that Article and under the specified circumstances mentioned in that Article.

"33. Power of Parliament to modify the rights conferred by this part in their application to Forces.

Parliament may by law determine to what extent any of the Rights conferred by this Part shall, in their application to the members of the Armed Forces or the forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them."

11. When the Constituent Assembly added this article in Part III itself, an Article which specifically gives power to Parliament permanently to *abrogate* or *abridge* any fundamental right and that Article restricts the power of *abridging* or *abrogating* any fundamental rights by specifying the citizens in respect of whom alone such power is allowed to Parliament and also by specifying the purpose for which alone such power is exercisable, it is obvious that further power of *abrogating* or *abridging* the fundamental rights was not intended to be conferred on Parliament.

12. So also the incorporation of Article 34 has the same significance and implication. This Article is as under.

"34. Restrictions of Rights conferred by this part while martial law is in force in any area.

Notwithstanding anything in the foregoing provisions of this part, Parliament may by law indemnify any persons in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area."

Here also the power is given to Parliament to *restrict* certain relevant rights under conditions and for purposes which are specified and strictly delineated.

13. If the authors of the Constitution had intended that Article 368 was the one which gives power to amend any provision of Part III in the *direction of abridgement or abrogation*, there would have been no need to incorporate in anticipation Articles 33 and 34 in Part III itself. Article 368 would have been considered sufficient to empower Parliament to legislate in a manner which permitted the abrogation or abridgement or restriction which is found actually provided for in Articles 33 and 34. The title of Article 368 "Amendment of the Constitution" has reference to the power of amendment of the provisions of all parts of the Constitution, barring Part III except to the extent already mentioned in Articles 33 and 34. And it is such power under Article 368 the leaders had generally in view when they spoke of the amendability of the Constitution. In view of the existence of these two Articles in Part III it is obvious. The Part III was not intended and should not be held to be amendable in the direction of abrogation or abridgement in any other manner by Parliament. To try to give such power to Parliament defeats the very purpose of Part III and is unwise in the context of the special circumstances of our nation.

14. The various religious, linguistic and social minorities or socially weaker sections of the nation who relied upon the unabridgable and unabrogatable fundamental rights cannot, if the Bill is passed have any longer a due sense of security that their rights are safe in the country and that the Supreme Court is the final protector of them. We may say today that we have no intention to abridge or abrogate such rights though we have taken the power to do so. But the fact that the declaration of such intention may not bind even our immediate successors of tomorrow is proved by the history of this very Bill, which seeks to exercise the power to amend any provision of the Constitution whereas the framers of the Constitution had intended that the Fundamental Rights as laid down in Part III including Article 32 would indisputably be held to be a permanent and basic feature of the Constitution.

15. The creation by the Bill of a sense of insecurity among these whose rights were permanently safeguarded in Part III of the Constitution will have a very undesirable psychological effect specially on the minds of those whose rights are referred to in the sections of Part III relating to Rights to Equality, Right to Freedom of Religion, Cultural and Educational Right and Right to Constitutional Remedies.

16. It is politically unwise to make a wholesale, sweeping revolutionary change in the foundational structure of our composite

nations' Constitution simply because the Supreme Court in Golak Nath case held that that structure cannot be weakened by Parliament. The sole, repeatedly advanced, agreement on which the Select Committee's recommendation is based is that our Constitution should keep pace with socio-economic changes in a dynamic society. The issue at the back of the mind of most members evidently was that the word 'Compensation' in Article 31 had been interpreted by Courts to mean compensation at the current market value of a property acquired by Government and such interpretation had imposed such unbearably heavy burden on the taxpayers that it was in national interest so to amend the Article as to make such an interpretation impossible. As the artificially risen higher market value was the result of social forces in the concerned area—growth of population, developmental programmes, increase in industrial or trade activity and allied causes and not of any special effort of the individual owning the acquired property, there would be justification to see that the individual does not *ultimately* gain exorbitantly from the operation of such social forces, independently of him. But means other than the present Bill have to be discovered to pull back into the public revenues the taxpayers money unreasonably diverted into an individuals pockets. Political ingenuity has not exhausted all its resources. But for the above purpose, there is no justification for making a wholesale sweeping revolutionary change in the foundational structure of our composite nations' Constitution and for Parliament's assuming power to abridge or abrogate even those Fundamental Rights which relates to Rights to Equality and Freedom of Religion, Cultural and Educational Rights and the Right to Constitutional Remedies.

17. The provision made in the recommendation of the Select Committee that the abridgment or abrogation of a Fundamental Right must have the approval of both Parliament and a certain proportion of the State Legislatures is illusory. The proviso to Article 368 would only mean that such abridgment or abrogation can, in certain cases, be the decision merely of a majority of *even one vote* of the total membership of each House of Parliament, for if half the States support such decision of Parliament and half oppose it, Parliament's bare one vote majority will enforce that decision. The proviso is so worded that the supporting vote of half the States has value and the opposing vote has none, though they are equal in number. Equal votes have been given unequal value. The 'yes' votes have effect. The 'No' votes have none.

18. The danger to the type of Rights contained in the sections of Part III I have specially referred to above in Para 15 may not thus

be considered as imaginary, for symptoms of a majority not considering itself as trustee for the rights of a minority are on the increase. These are particularly visible in the sphere of language and education in many parts of the country. The decision of the National Integration Council at Srinagar to avoid the consideration of the question of language has its significance. Moreover when the emotion of an emotional people are whipped up. The majority is unable to function as trustee for the minorities.

19. I may in conclusion mention that the Advisory Committee of the Constituent Assembly had appointed a Special Sub-Committee to deal with the question of Fundamental Rights. We were clear, in view of the discussions and the spirit which prevailed in the Advisory Committee at the end of the struggle for national freedom that we were framing a set of Basic Rights which would constitute a kind of the Pact incorporating the understanding arrived at between representatives of all sections of our people as to mutual rights and obligations and conceived as essential for holding the composite nation together. The inviolability of this Pact conceived as above, was patent to our mind. We knew what was our objective and what was the need of the composite nation. Of the twelve members of that Sub-Committee six are now alive: Shri Acharya Kripalani, Dr. K. M. Munshi, Shri M. R. Masani, Shrimati Hansa Mehta, Sardar Harnamsing, and myself. It is not a mere coincidence that all the six of us still hold that the Rights contained in Part III were not to be abridgeable or abrogatable by Parliament, except to the extent and for the purposes specified and provided for in that Part III itself and that the only place where the power to abridge or abrogate any right conferred by that Part is to be found is that Part itself. The attempt to derive such power from Article 368 as it is or as it is proposed to be modified is both wrong and dangerous from the point of view of national solidarity, the basic consideration of any national government.

NEW DELHI

JAIRAMDAS DAULATRAM.

July 7, 1968.

IV

In their judgment dated the 27th February, 1968, on the validity of the Constitution (Seventeenth Amendment) Act, 1964 in the Golak Nath case, the Supreme Court by a majority declared that Parliament will henceforth have no power to amend any provision of Part III of the Constitution so as to take away or abridge the Fundamental Rights enshrined therein. The Supreme Court were led to this conclusion by the express provision of article 13(2) which laid down that the State shall not make any law which took away or abridged the rights conferred by Part III and that any law made in contravention of this clause shall, to the extent of the contravention, be void. In the opinion of the Supreme Court an amendment to the Constitution was 'law' within the meaning of article 13 of the Constitution and, therefore, if it took away or abridged the rights conferred by Part III, it would be void.

2. In the statement of Objects and Reasons of the Bill, it has been stated that the Bill sought to assert the right of Parliament to modify Fundamental Rights in special circumstances.

3. In their Report, the Joint Committee have made four changes in the Bill as introduced by Shri Nath Pai. Of these, one—i.e., to clause 1—is only of a verbal nature. The second amendment—i.e., to the marginal heading to article 368—seeks to show that article 368 deals with the substantive power of amendment rather than with the procedure of amendment, as held by the majority of the Supreme Court. By their third amendment, the Joint Committee have sought to make all amendments made by Parliament under article 368 immune from the provisions of article 13. By their fourth amendment, the Joint Committee have sought to bring the Fundamental Rights within the purview of the proviso to article 368, thereby requiring the ratification of constitutional amendments relating to Fundamental Rights by the Legislatures of not less than one half of the States.

4. While the last mentioned amendment is intended to serve as a check against hasty erosion of Fundamental Rights, the other changes made by the Joint Committee only seek to further the object of the Bill, viz., to reverse the Supreme Court's judgment in the Golak Nath case.

5. We beg to differ with the majority report of the Joint Committee on the following grounds:—

(i) In the scheme of the Indian Constitution which was adopted, enacted and given to the people by the people themselves, Fundamental Rights occupy a transcendental position. These rights were sacrosanct and could not be taken away or abridged by Parliament by following the procedure laid down in article 368. As observed by one of the learned judges of the Supreme Court in his judgment, "the Constitution gives so many assurances in Part III that it would be difficult to think that they were the play things of a special majority". We are fortified in our views by the evidence of one of the honourable members of the Constituent Assembly, Shri K. Santhanam, given before the Joint Committee. He stated that at the time the Constituent Assembly was framing Part III on Fundamental Rights, it was never in the minds of members that, by a two-thirds majority, Part III could be repealed. It was intended that the Fundamental Rights should be more or less sacrosanct.

(ii) We also agree with the views expressed by one of the learned witnesses, Shri N. A. Palkhivala, that the chapter on Fundamental Rights provides for political stability. In view of the diverse ideologies, faiths and creeds prevailing in the country, it was of prime importance that Fundamental Rights were not tinkered with. Further, the timing of the introduction of the proposed measure was also inopportune. At the present juncture when there was scant respect for the rights and liberties of citizens and the law, nothing should be done which would in any way undermine the authority of the Supreme Court. The proposed legislation, for which there was no pressing urgency, might create a new conflict between the highest legislative and judicial organs in the country (*viz.* Parliament and Supreme Court). A hasty step taken now may become irretraceable later on.

(iii) As observed by another witness, Shri Purshottam Trikamdas, in his evidence before the Joint Committee, Fundamental Rights guaranteed by the Constitution were the basic minimum rights which were necessary for an individual in a democratic-socialist society. The General Assembly of the United Nations had recently adopted two Covenants *viz.*, Covenant on Civil and Political Rights and Covenant on Social and Cultural Rights. The rights contained in the former Covenant correspond to the rights enumerated in Part III of our Constitution. Now when the trend all over the world was to adopt some basic minimum rights for the individual and to make these rights justiciable, nothing should be done which would have the effect of whittling away the Fundamental Rights enshrined in our Constitution.

(iv) It is true that the Constitution empowers Parliament to make amendment to the Constitution and in that sense Members of Parliament could be said to have a mandate for making these amendments. But when the amendments seek to touch the fundamentals on which our Constitution rests, can it be said that the electoral mandate embraces basic changes also? Can Parliament, for instance, by a two-thirds majority replace the republican form of Government by a monarchical one, or a democratic form by a non-democratic one or transform our secular state into a theocracy. It will be putting too much strain on the Constitution to say that the mandate that Members of Parliament receive from the people includes the right to modify these fundamental principles. Only Members of a Constituent Assembly elected by the people specifically for framing a new Constitution or altering the old one in a fundamental manner, will have the moral authority to make the changes which the present amendment bill seeks to sanction.

(v) We ourselves hold that during the last 18 years many fundamental questions have been raised and the best method of resolving them is to call a Constituent Assembly as suggested by the majority judgement of the Supreme Court under the residuary powers of Parliament. There is thus the question, raised by Justice Hidayatullah himself, as to whether the right to private property in the means of production should be included in the Fundamental Rights. We share the opinion of Justice Hidayatullah that it was a mistake to include this right in Part III of the Constitution and that it was probably done under the influence of Section 299 of the Government of India Act, 1935. Then there is also the question of the redistribution of powers as between the Centre and States and States and organs of local self-government. There is the further question of suitability of the parliamentary form of Government as against the Presidential. All these questions can only be thrashed out by convening a new Constituent Assembly and not by challenging the majority judgement of the Supreme Court through a Constitutional Amendment Bill.

(vi) It is often said that the object behind this Bill is to facilitate economic reforms and social change the more likely result will be a further abridgement of citizens democratic freedoms and civil liberties. We are, therefore, constrained to oppose this Bill.

(vii) *It is also doubtful whether the Bill, if passed, would result in the achievement of the desired aim, inasmuch as article 368, as proposed to be amended, like the existing article 368, would not be applicable to Part III, in view of the express provisions of article 13 (2). It can be effective only if and when the Supreme Court decides to*

revise its own judgement, in which case the present article 368 will suffice.

In view of what we have stated above, we feel that the Bill should not be proceeded with any further. In case, however, Parliament thinks it absolutely essential to do so, the Bill should be so modified as to provide that all constitutional amendments abridging or taking away Fundamental Rights, after they go through the normal process of amendment, should be subject to ratification by the people through a referendum.

NEW DELHI;
July 20, 1968.

S. M. JOSHI
KAMESHWAR SINGH

Bill No. 10-B of 1967

THE CONSTITUTION (AMENDMENT) BILL, 1967

By

SHRI NATH PAI, M.P.

(AS REPORTED BY THE JOINT COMMITTEE)

[Words side-lined or underlined indicate the amendments suggested by the Committee; asterisks indicate omissions]

A Bill further to amend the Constitution of India.

BE it enacted by Parliament in the Nineteenth Year of the Republic of India as follows:

1. This Act may be called the Constitution (Amendment) Act, 1968. Short title.

2. In the Constitution,—

(a) in article 368, for the marginal heading, the following marginal heading shall be substituted, namely:— Amendment of article 368.

“Power to amend the Constitution”;

- (b) the said article shall be renumbered as clause (2) thereof, and before clause (2) as so renumbered, the following clause shall be inserted, namely:—

“(1) Parliament may by law amend any provision of this Constitution in accordance with the procedure laid down in this article.”;

- (c) in clause (2) as so renumbered, in the proviso, in clause (b), before the words and figures “Chapter IV of Part V”, the following shall be inserted, namely:—

“Part III,”; and

- (d) after clause (2) as so renumbered, the following clause shall be inserted, namely:—

“(3) Nothing contained in article 13 shall apply to any law made in pursuance of this article”.

S. L. SHAKDHER,
Secretary.